United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING EN BANC

ORIGINAL 76-7475

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

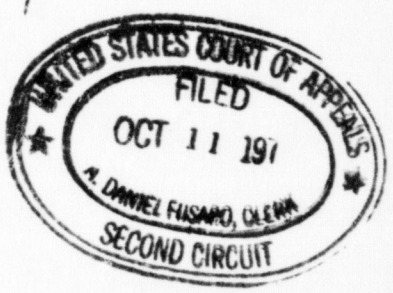
JOSEPHINA DUCHESNE, as Administratrix of the Estate of Pauline Perez, et al.,

Plaintiffs-Appellants

-against-

JULE M. SUGARMAN, et al.,

Defendants-Appellees.



On Appeal from the United States District Court for the Southern District of New York,

PETITION FOR REHEARING
WITH SUGGESTION FOR
REHEARING EN BANC

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Introduction

This brief is submitted in support of the municipal appellees' petition for reargument and, in the alternative, their suggestion of en banc rehearing of this Court's decision herein, dated September 28, 1977, insofar as it held that the plaintiffs' evidence adduced in the District Court was sufficient to require that the issue of these appellees' liability to plaintiffs must be submitted to a jury.

ARGUMENT

(1)

The grounds upon which we seek reargument or en banc consideration are related, but we believe they may be separately stated. They are:

First, we believe that the Court in its decision in this case has ignored the teaching of the Supreme Court that §1983 is to be read in harmony with general principles of tort law (see Imbler v. Pachtman, 424 U.S. 409, 417-419 [1976]), and, instead, has adopted a rule for imposing liability for damages on public officials which is unknown to the common law and contrary to accepted common law principles.

Second, in holding that liability may be imposed on such officials under what appears to be analogous to a negligence standard, we believe the Court overlooked the fact that in every instance in which the Supreme Court has indicated that a public official may be cast in damages under §1983 there has been present the element of intentional action taken with respect to particular individuals (see, e.g., Wood v. Strickland, 420 U.S. 308 [1975]) or its moral and jurisprudential equivalent (see, e.g., Scheur v. Rhodes, 416 U.S. 232, 235 [1974], pointing out that the complaints there alleged that the defendants acted "intentionally, recklessly, willfully and wantonly").

Third, in citing in its opinion cases such as Rizzo v. Goode, 423 U.S. 362 (1976), Allee v. Medrano, 416 U.S. 802 (1974) and Hague v. CIO, 307 U.S. 496 (1939), we believe the Court overlooked the fact that what was sought in those cases was injunctive relief, not damages. As Imbler v. Pachtman, supra, demonstrates, where damages are sought under §1983, far different considerations apply. Compare also Estelle v. Gamble, 429 U.S. 97 (1976).

Fourth, we believe the Court in this case read Wood v. Strickland, supra, far more broadly than that specifically narrow holding was intended to be read (see 420 U.S. at 322: "in the specific context of school discipline"), and at the same time altogether ignored the sound, traditional tort law, arguments to be made in this context in favor of not subjecting public officials to "the burden of a trial and to the inevitable danger of its outcome." Gregoire v. Biddle, 177 F. 2d 579, 581 (2d Cir., 1949) (Learned Hand, J.), cert. denied 339 U.S. 949 (1950), cited with approval in Imbler v. Pachtman, supra, 424 U.S at 428.

Fifth, notwithstanding the manual failed to contain the qualification, required by state law, that all emergency removals must be promptly ratified by court order, and the apparent ignorance of two of the individual defendants of this state law requirement, and notwithstanding the ease with which the Court in this case has distinguished Boone v. Wyman, 295 F. Supp. 1143 (S.D.N.Y.), aff'd per curiam, 412 F. 2d 857

(2d Cir., 1969), cert. denied, 396 U.S. 1024 (1970), we submit that under any fair "objective standard" of good faith a jury could not properly infer that these defendants knew, or should have known, at the time here relevant (1969 to 1971), that the policy they are claimed to have promoted violated the "basic unquestioned constitutional rights" of Pauline Perez or her children. See Wood v. Strickland, supra, 420 U.S. at 322. Stanley v. Illinois, 405 U.S. 645, wasn't decided until April of 1972, after the state court neglect proceeding had already been commenced, and prior to the decision in Stanley v. Illinois certainly in this circuit under Boone v. Wyman, it was not at all clear that what occurred here violated basic, unquestioned constitutional rights. Quite the contrary, in Judge Mansfield's opinion in Boone v. Wyman, which made no mention in that portion of the opinion where the question of due process was discussed of the fact of voluntary consents by the mothers (see 295 F. Supp. at 1148-1151), Judge Mansfield quite clearly indicated that it was his view that the state judicial remedies available to parents satisfied any due process requirement in "circumstances showing that a parent is unfit to care for or support his or her child." Id. at 1150. This view was shared by Judges Waterman, Hays and Bartels (see 412 F. 2d 857) and the Supreme Court denied certiorari (396 U.S. 1024).

But, the defendants here, whose subjective good faith is in no way questioned, it has been held, must stand trial and satisfy a jury as to their objective "good faith" in failing to have more prescience as to future developments in constitutional law than these four distinguished federal judges possessed.

This is, we submit fundamentally unjust. It certainly was not the intent of the Congress that enacted the Ku Klux Act of 1871, and, however §1983's reach has been expanded, such injustice finds no support in the decisions of the Supreme Court, or, for that matter, in any prior holding of this court of which we are aware.

Sixth, and finally, even if the test for liability of public officials under §1983 is to be, as the Court here suggests, one of negligence, subject to an affirmative defense of good faith which must be submitted to the jury, we submit that even on this theory the evidence here was insufficient to submit the issue of the individual defendants' liability to the jury. Whatever the incorrectness of these defendants' views as to the right of BCW to hold a child without a court order, that is not the basis upon which the Court has held they may be held liable; rather, objectively, it is their failure to include in the manual a specific guideline, conforming to what state law already required, directing that court approval be promptly sought following an emergency removal.

But, again objectively, how was the need for such a directive to be foreseen? Plaintiffs have shown no pattern of such conduct and this Court in its opinion(footnote 31) specifically noted that on this record "there is no basis for concluding that the officials knew or should have known of the conduct taken with respect to these children." Moreover, the defendant Beine testified that the long term placement of these children without the written consent of a parent or a court order was the first such case of its kind ever brought to her attention (Statement of Evidence, pp. 6-7, par. 19) (and she only learned of it from this suit).

In short, what occurred here was, as a practical matter, "unforeseen and unforeseeable by higher authority," Johnson v. Glick, 481 F. 2d 1028, 1034 (2d Cir., 1973), and it should thus be held, as a matter of law, that the failure of the manual to provide for this situation constituted neither a breach of a duty owed to plaintiffs nor the proximate cause of their injury.

Ironically, the net effect of what this decision accomplishes, we believe, is to make it more hazardous to be a government official engaged in trying to protect children against

the dangers of abuse or neglect than to be an official who is concerned with punishing people or law enforcement. The prosecutor can with apparent impunity under §1983 knowingly use false testimony or suppress material evidence. Imbler v. Pachtman, supra. The police can defame one. Paul v. Davis, 424 U.S. 693 (1976). The jail doctor or official is not responsible for neglect of prisoners' illnesses except where there are circumstances present indicating an evil intent or such as to shock the conscience. See Arroyo v. Schaefer, 548 F. 2d 47 (2d Cir., 1977) (Gurfein, J.). And, we assume, in the case of a school board member who has joined in the presumably carefully arrived at decision to impose discipline on a student, the case could not go to the jury unless the evidence were sufficient to support an inference that such official acted in "disregard of the student's clearly established constitutional rights," rights so clearly established as to be considered "settled," "indisputable", "basic" and "unquestioned" (Wood v. Strickland, supra, 420 U.S. at 321- 322 (emphasis supplied).

Here, in contrast, it has been held that the case must go to the jury because all or certain of these defendants, affirmatively attempting to help children who may be abused or neglected, failed to anticipate future developments in constitutional law, a standard which neither school board members

(Wood v. Stricland, supra) nor police officers (Pierson v. Ray, 386 U.S. 547, 557 [1967]) are held to.

Also ironically, the only authorities the Court cites in that portion of the opinion (typed opinion, pp. 21-22) where it specifically sets forth this theory of liability are all injunction cases. The Supreme Court's repeated instruction that in damage actions the basic guide to construction of §1983, the animating principle, is traditional tort law (see, e.g., Imbler v. Pachtman, supra, 424 U.S. at 417-419; Wood v. Strickland, supra, 420 U.S. at 316-321) is simply ignored.

This is creative lawmaking, but, we very respectfully submit, this decision is wrong in result, defective in its logic and inconsistent with every indication the Supreme Court has to date given as to the proper construction to be placed on §1983 in damage actions.

(2)

Insofar as this petition seeks only rehearing by the panel of the Court which decided this appeal, we would note that we are aware of the infrequency with which such relief is granted. However, the Court's opinion acknowledges (typed opinion, p. 18), that this is a "troublesome problem", and, based upon the arguments we have made here, we would very respectfully request that the Court reconsider its most

sweeping holding in this case.

Insofar as en banc consideration is sought, we submit that this is a "proceeding [which] involves a question of exceptional importance." FRAP, Rule 35(a). The Court's decision vastly expands the potential for liability of government officials and, if allowed to stand, may most severely affect the conduct of state and local government affairs. It will also, if it is allowed to stand, determine a "major doctrinal trend" for this circuit, and, accordingly, is worthy of en banc consideration. See Moody v. Albemarle Paper Co., 417 U.S. 622, 626 (1974); United States v. American-Foreign SS Corp., 363 U.S. 685, 690 (1960).

CONCLUSION

Rehearing should be granted and upon rehearing the order of the District Court dismissing the complaint as against the individual defendants-appellees should be affirmed. Failing the grant of such relief, we respectfully suggest that rehearing en banc should be ordered.

October 7, 1977

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel,
Attorney for the Municipal
Official Defendants-Appellees.

L. KEVIN SHERIDAN,

of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

BRIAN SUGDEN being duly sworn, says that on the 11 day of OCT., 1977, he served the annexed PETITION upon LISA H. BLITMAN Esq., the attorney for the OPP. ATTY herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 24 W. 87TH ST. in the Borough of MAN'H., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

11 day of OCT., 1977

Bruce Garner

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

Brian Sugden

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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

BRIAN SUGDEN being duly sworn, says that on the 11 day of OCT., 1977, he served the annexed PETITION upon FREDERICK J. MACOVERN Esq., the attorney for the OPP. ATTY herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 102 E. 35TH ST. in the Borough of MAN'H., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

11 day of OCT., 1977

Bruce Garner

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
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Brian Sugden

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